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NO. ____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DOUGLAS EDWARD BATTI, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the manner in which a traveler in an airport says "no" to a police officer's request to search may form an articulable basis for reasonable suspicion without placing an impermissible burden upon the right to refuse consent.

2. Whether the Court of Appeals' disregard for the factfinding role of the District Court constituted a direct and irreconcilable conflict with binding precedents of this Court governing application of the clearly erroneous standard of review.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Douglas Edward Batti and the respondents United States of America.

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PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner Douglas E. Batti respectfully prays that a writ of certiorari issue to review the judgment and memorandum opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 17, 1992.

OPINION BELOW

The opinion of the Court of Appeals and the order of the District Court of the District of Hawaii granting Defendant's Motion to Suppress appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 17, 1992. A timely petition for rehearing en banc was denied on May 8, 1992, and

this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On February 26, 1991, Douglas Edward Batti arrived at Honolulu International Airport on a Continental Airlines flight from Los Angeles, where he had been for two days. He exited the aircraft at the front of the line and walked briskly from the terminal. DEA agent Joyce Alapa stopped Mr. Batti and asked him where he had been, where he was going, and if she could examine his plane ticket. She noticed that Mr. Batti shifted his weight nervously and that his hand was shaking.

Agent Alapa told Mr. Batti that she was investigating narcotics trafficking, and asked him whether he was carrying narcotics. When he said "no", she asked to search his bag. Mr. Batti refused the request, picked up his bag and clutched it to him. Agent Alapa then informed Mr. Batti that unless he consented to a search, she would detain his bag and put a narcotics detecting dog on it. Without Mr. Batti's consent, she then took the bag to the DEA Task Force Office to wait for the dog. Mr. Batti and Agent Alapa's partner, Agent Ohia, followed. The dog "alerted" to the bag, indicating that the dog smelled narcotics, and Mr. Batti was placed under arrest. Prior to the dog sniff the agents detained the bag about twenty minutes.

Petitioner brought a pre-trial Motion to Suppress in Federal District Court for the District of

Hawaii. The Honorable Samuel P. King heard the motion. The prosecution called as its witnesses the two police officers, Alapa and Ohia. These witnesses were cross-examined by Mr. Batti's counsel. The trial court also questioned the witnesses.

On May 22, 1991, the District Court issued its Order Granting Petitioner's Motion to Suppress. See Appendix at 1a - 5a. The Court concluded that Petitioner and his luggage had been seized by the police, but that neither seizure was supported by a reasonable, articulable suspicion of criminal activity. See Appendix at 4a-5a.

In accordance with its duty under Rule 12(e) of the Federal Rules of Criminal Procedure, the District Court set forth its essential findings of fact in its five page memorandum decision and order. The government appealed from the trial court's order. On appeal, although the government conceded that the District Court's factual findings were to be upheld unless clearly erroneous, the government did not allege that a single specific factual finding of the District Court was unsupported by the evidence.

On March 17, 1992, the Court of Appeals issued its Memorandum decision reversing the District Court's Order Granting Defendant's Motion to Suppress. See Appendix 6a - 10a. The Court of Appeals properly ruled that the District Court's findings of fact were reviewed under the clearly erroneous standard. See Appendix at 7a. The appellate court did not determine that any of the District Court's factual findings were clearly erroneous, but nevertheless reversed the trial court's ultimate conclusion that no reasonable suspicion existed. Petitioner timely filed for rehearing en banc on

April 3, 1992. The Petition for rehearing was denied on May 8, 1992. See Appendix at 11a.

The Court of Appeals made several findings of its own from the cold hearing transcript, significantly modified two central findings of the District Court, and completely disregarded two other important factual findings made by the District Court. See Appendix at 12a - 13a, which is a chart comparing the Court of Appeals' analysis of the factual issues with the District Court's findings of fact.

REASONS FOR GRANTING THE WRIT

I. STRICT ADHERENCE TO CLEARLY ERRONEOUS REVIEW REQUIRES EITHER AFFIRMANCE OR REMAND

This Court has repeatedly and emphatically held that the appellate courts must give due deference to the experience and expertise of the trial court in determining the facts, and not make de novo factual findings.

In Anderson v. Bessemer, 470 U.S. 564, (1985), this Court defined clear error:

> [a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. United States v. United States Gypsum, 333 U.S. 364, 395 (1948).

This Court went on describe when the appellate court must defer to the factual findings of the District Court:

> If the district court's account of the evidence is plausible in light of the record viewed in its

> entirety, the court of appeals may not reverse it even though convinced that it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (Citations omitted).

In Maine v. Taylor, 477 U.S. 131, 144-45 (1986), the Court re-emphasized that the appellate courts are not to engage in factfinding:

> [F]actfinding 'is the basic responsibility of district courts, rather than appellate courts. Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982), quoting, DeMarco v. United States, 415 U.S. 449, 450, n. (1974). As this Court frequently has emphasized, appellate courts are not to decide factual questions de novo, reversing any findings that they would have made differently. See e.g., Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969).

Finally, this Court held that special care must be taken by the reviewing court when the fact finder is basing his or her determinations on witness credibility:

> When findings are based upon determinations regarding credibility of witnesses, [the standard] demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what was said. See, Wainwright v. Witt, 469 U.S. 412 (1985).

Based upon these holdings, the Court of Appeals had two choices in this case: a) uphold the District Court's findings, or b) reverse them as clearly erroneous.

If the Court of Appeals perceived the District Court's findings to be unclear or insufficient, then it should have remanded the matter to the lower court for more detailed, specific findings. See, DeMarco v. United States, 415 U.S. 449, 450 (1974) United States v. Castrillion, 716 F.2d 1279, 1282-84 (9th Cir. 1983) Wright v. Miller, Federal Practice & Procedure, Section 2577 at 697 and N.93 (1984).

Certiorari should be granted here because rather than defer to the District Court, find clear error, or remand back for more detailed findings, the Court of Appeals "simply expressed disagreement and substituted its own factual findings for those of the District Court." Amadeo v. Zant, 486 U.S. 214, 223 (1987).

II. THE COURT OF APPEALS DID NOT GIVE DUE DEFERENCE TO THE DISTRICT COURT'S FINDINGS WHICH WERE BASED UPON WITNESS CREDIBILITY

Recent case law demonstrates that it does not take many facts to form an articulable basis supporting an experienced police officer's reasonable suspicion when confronting a traveler at an airport. See United States v. Sokolow, 490 U.S. 1, 4 (1989); United States v. Mondello, 927 F.2d 1463, 1470-71 (9th Cir. 1991); United States v. Ayarza, 874 F.2d 647, 651 (9th Cir. 1989). Therefore, it becomes very important when the appellate court changes any of the factual findings of the trial court. In this case, even slight changes in the facts

can make the difference between reasonable suspicion and no reasonable suspicion.

The Court of Appeals found reasonable suspicion upon the following facts:

> The agents' seizure of Batti was supported by reasonable suspicion. Batti arrived in Honolulu after a two-day trip to a drug-source city, Los Angeles. He exited the airplane in a hurry and told Agent Alapa that he was rushing to catch his connecting flight. This explanation was implausible in light of the fact that the connecting flight was not scheduled to leave for an hour and a half. Batti also was unable to produce his ticket when asked to do so by Agent Alapa. Furthermore, after being questioned by Alapa, Batti began to act nervous and his hands began to shake. Finally, when asked permission to search his bag, Batti did not merely say "no." Rather, he picked up the bag, put his arms through the handles, clutched the bag towards his body, and stepped a couple of paces away from Alapa.

See Appendix at 9a. Here, instead of deferring to the trial court, the Court of Appeals changed the factual findings to a different conclusion. (See attached chart, Appendix at 12a - 13a.)

First, the District Court made no finding that Batti told the agent he was rushing to catch a connecting flight, yet the Court of Appeals made such a factual finding. The Court of Appeals then went on to find that this explanation was "implausible." The appellate panel's finding of implausibility directly contradicts two trial court findings: a) that nothing was elicited from Mr. Batti

that was unusual or that could lead to the inference of drug possession; and b) that many innocent travelers exit planes in a hurry to retrieve their luggage or make connecting flights, even if they have lengthy stopover periods. See Appendix at 4a.

Furthermore, the appellate panel's finding of implausibility is simply wrong. If the Court of Appeals would not accept the findings of the trial court, then the Court should at least have taken judicial notice of the facts as they exist at Honolulu International Airport.[1] The relevant facts for judicial notice, as presented to the Court

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1. Petitioner requests that the Court take judicial notice of certain facts pursuant to Rule 201 of the Federal Rules of Evidence. Said Rule provides, in pertinent part, that:

> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is (1) generally known within the territorial jurisdiction of the trial court...
>
> **(d) When mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
>
> **(f) Time of Taking notice.** Judicial notice may be taken at any stage of the proceeding.

Subdivision (f) of the Notes of the Advisory Committee of this rule provides that:

> **Subdivision (f).** In accord with the usual view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. Uniform Rule 12; California Evidence Code Section 459; Kansas Rules of Evidence Section 60-412; New Jersey Evidence Rule 12; McCormick Section 330, p. 712.

of Appeals in Petitioner's timely Petition for Rehearing, are as follows:

1) At the Honolulu International Airport, the interisland carrier flights leave from terminals which are physically separate from the terminal that serves Continental Airlines;

2) The Continental Airlines arrival gate is quite distant from either the Aloha or the Hawaiian Airlines interisland terminals;

3) It is common for residents of Hawaii arriving from the mainland not to be ticketed through to an outer island destination;

4) It is common for residents of Hawaii to separately purchase their tickets for flights from Honolulu to outer islands and such tickets are often purchased in books of coupons or are purchased at the ticket counter just prior to the flight;

5) The interisland carriers request that passengers be present at the terminal one hour prior to departure time even if the passenger has a confirmed reservation; and

6) There are a limited number of interisland flights from Honolulu to Hilo each day.

Given these facts, obviously known to the trial court sitting in Honolulu, the factual version adopted by the appellate panel is not implausible. Rather, it reflects the reality of inter-island air travel in Hawaii.

The Court of Appeals engaged in factfinding regarding Petitioner's airplane ticket in a manner similar to its finding of implausibility. The District Court made no finding of fact that Mr. Batti could not produce his airplane ticket, but the appellate panel made this finding and then considered it among the suspicious things leading to "reasonable suspicion." See Appendix at 7a.

Additionally, the appellate court made significant changes to a crucial finding of the trial court. The trial court made a finding that, when asked if he would consent to a search of his bag, Mr. Batti gave a negative response and picked up his bag and clutched it to him. See Appendix, at 1a - 2a. The appellate panel added to this finding their own more dramatic finding that "he picked up the bag, put his arms through the handles, clutched the bag towards his body and stepped back a couple of paces away from [Agent] Alapa." See Appendix at 9a. (Emphasis added.)

Apparently the appellate court believed that its own factual findings justified more suspicion than did the relatively innocuous facts determined by the trial court after hearing and evaluating the witnesses. Based upon its amended facts, the appellate court held that Mr. Batti's manner of saying "no" was part of the legitimate grounds for police suspicion. See Appendix at 9a.

This case is appropriate for certiorari because of two important flaws with the Court of Appeals holding. First, the appellate panel is not at liberty to change or ignore the facts found by the trial court. Second, this holding creates a whole new area of grounds for suspicion, to wit, the way a person says "no." According to the appellate panel, some ways of saying "no" are more suspicious than others. This holding further restricts the options of travelers when they are confronted by police at airports. It is well known that police use confrontations with travelers at airports as a routine investigative tool. Courts have justified such intrusions by holding that these encounters are consensual, and that people may simply continue on their way or refuse permission to search when asked. Under the holding in this case, even saying "no" may no longer be sufficient to keep the police from taking

one's belongings, if the expression of "no" in some way inflames police suspicion. [2]

The panel's attempt to distinguish numerous ways of saying "no" places an unworkable and impermissible burden on the citizen's right to refuse consent to a police search. This right is difficult enough to assert for a traveling citizen unexpectedly confronted by the police authorities. Holding in effect that "no" expressed in too dramatic a manner invites seizure of one's belongings by police, the Court of Appeals violated reason and our Constitution and reduced the "consensual encounter" theory to a farce. Under such a vitiated standard for refusal of consent, travelers will be subject to detention and their bags subject to seizure either with their consent or because they refuse to consent.

Finally, the appellate panel, in order to reach its result, chose to ignore the trial court's factual findings that Mr. Batti did not meet any drug profile, that his conduct, including his nervousness, was no different from many innocent travelers, and that the Agent's basis to seize and search Mr. Batti's bag was admittedly a "hunch" based on "instinct." See Appendix at 4a.

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2. Because the assertion of "no" by a traveler to a request to search is always seen as suspicious by police officers, it is likely that the "manner" of expressing that "no" will almost always arouse the suspicion of the police, e.g., it is said too quickly, too slowly, too emphatically, too nervously, with gestures, while walking away, while picking up one's belongings, etc.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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